Supreme Court, U.S.
FILED
FEB 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1190

In the Supreme Court of the United States

OCTOBER TERM, 1989

AMAZING STORES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

JOHN G. ROBERTS, JR.
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether, in a case in which the National Labor Relations Board determined that petitioner's numerous unfair labor practices were "pervasive, serious and committed by the highest management officials," the Board adequately considered the effect of employee turnover on the need for a bargaining order.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

NLRB v. *Century Moving & Storage, Inc.*, 683 F.2d 1087 (7th Cir. 1982)	7
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969)	3, 5
NLRB v. *J. Coty Messenger Service, Inc.*, 763 F.2d 92 (2d Cir. 1985)	6
NLRB v. *Knogo Corp.*, 727 F.2d 55 (2d Cir. 1984)	6
NLRB v. *L.B. Foster Co.*, 418 F.2d 1 (9th Cir. 1969), cert. denied, 397 U.S. 990 (1970)	7
NLRB v. *Pace Oldsmobile, Inc.*, 739 F.2d 108 (2d Cir. 1984)	6
NLRB v. *Western Drug*, 600 F.2d 1324 (9th Cir. 1979)	7

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 8(a)(1), 29 U.S.C. 158(a)(1)	3
§ 8(a)(3), 29 U.S.C. 158(a)(3)	3

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1190

AMAZING STORES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 887 F.2d 328. The decision and order of the National Labor Relations Board (Pet. App. A9-A13) is reported at 289 N.L.R.B. No. 24.

JURISDICTION

The judgment of the court of appeals (Pet. App. A58) was entered on October 20, 1989. The petition for a writ of certiorari was filed on January 18, 1990. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner owns and operates a chain of retail discount stores in the Philadelphia area. The United Food and

Commercial Workers, Local 1357, AFL-CIO (Union) began organizing certain employees in petitioner's nine stores in late October 1985. The Union quickly received cards requesting Union representation from 23 of the 36 employees in the bargaining unit. Pet. App. A21-A22. The Union then asked petitioner to recognize it as the employees' bargaining representative. *Ibid.* The administrative law judge found (Pet. App. A41) that petitioner responded with:

> [a] calculated plan of coercion and intimidation orchestrated and implemented by [owners] Joseph Lieberman and Jack Segal, through individual meetings with all but one of the Company's employees. The centerpiece of the campaign was the constantly repeated assertion of Lieberman or Segal or both in these meetings where they each applied pressure to the unaccompanied, sometimes frightened, individuals by means of threats that the stores were going to be closed or sold to Koreans who, in turn, would hire their own relatives and discharge the current employees. The threats uttered at the individual meetings were given additional substance by appearances of Lieberman and Segal accompanied by one or more oriental persons, a theatrical device I have found to have been staged by Segal in order to heighten the employees' anxieties.

Petitioner also threatened to withhold (and did delay) payment of Christmas bonuses, coercively interrogated employees, created the impression that union activities were under surveillance, and promised benefits in order to discourage the employees' support for the Union. Pet. App. A44, A25-A35. In addition, petitioner denied union activist Ralph Atwell a Christmas bonus and a raise because he had given petitioner "too much grief about the Union." Pet. App. A11, A31, A35; Tr. 148-152, 164-165. Finally, petitioner denied a Christmas bonus to, and then discharged,

Gail Davis because she was the only employee who refused to discuss the union campaign with Segal. Pet. App. A10, A38-A39. The Union lost the representation election.

2. On the basis of charges filed with the National Labor Relations Board, a complaint was issued alleging that petitioner had engaged in unfair labor practices during the election campaign. Pet. App. A18. An administrative law judge found, after a hearing, that petitioner had violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by the conduct set out above. Pet. App. A44. The ALJ further found that: (1) the Union had majority support of the unit employees at the time it requested recognition by petitioner, (2) petitioner's refusal to recognize and bargain with the Union constituted an unfair labor practice, and (3) a bargaining order was warranted under this Court's decision in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). Pet. App. A41-A42. In concluding that lesser remedies would not protect the employees' rights, the ALJ explained (*ibid.*):

> I discerned not one iota of regret or remorse that [Lieberman and Segal] had done these things. I have no doubt that if, as the result of my recommendations in this case, a second election were to be ordered, Lieberman and Segal would find the means to let their employees know that their joint will is unchanged and that the advent of the Union would mean the end of their connection with Amazing Stores.
>
> It is for the last reason, more than the other unfair labor practices, even the mistreatment of Ralph Atwell and the discharge of Gail Davis, that I feel that the ordinary remedies of notice posting, cease and desist, and a new election would not properly protect the rights of the employees here so egregiously disregarded, and that a bargaining order, as requested by the General Counsel, would be the most appropriate remedy.

The Board affirmed the ALJ's decision and adopted his recommended remedial order with certain modifications not relevant here. Pet. App. A9. The Board also denied petitioner's motion to reopen the record to gather evidence concerning the turnover of employees in the bargaining unit. The Board explained that the unfair labor practices "were pervasive and serious," were "committed by highest management officials," and were "directed at virtually every employee in the bargaining unit." *Id.* at A9-A10 n.2. In those circumstances, the Board found that it was "foreseeable that [petitioner's] record of coercion would become known to new employees and the impact of [its] violations would be likely to persist despite any turnover, thus preventing the holding of a fair election." *Ibid.*

3. The court of appeals upheld the Board's decision and enforced its bargaining order. Pet. App. A2. The court rejected petitioner's contention that its misconduct was not sufficiently serious to warrant a bargaining order. *Id.* at A4. It also rejected petitioner's contention that the Union had not demonstrated majority support of the unit employees. *Ibid.* Petitioner does not challenge those rulings in this Court.

The court of appeals also ruled that the Board had properly denied petitioner's motion to reopen the record to show that the turnover of employees in the unit had eliminated the need for a bargaining order. The court stated that "determination of whether a *Gissel* order is necessary rests on consideration of both the nature and pervasiveness of the employer's misconduct as well as the amount of turnover." Pet. App. 6. The court noted that, in a case such as this one, "[w]here the Board finds that a practice is particularly pervasive or enduring, it need make only minimal findings that the effects have not been dissipated by subsequent employer turnover." *Ibid.* The court explained (*id.* at A7):

> Where the Board finds that the employer misconduct is pervasive and likely to persist despite turnover, these

> conclusions alone are sufficient to satisfy the turnover inquiry. Forcing the NLRB to question new employees as to their knowledge of earlier representation elections is not only unnecessary to support its conclusion, but also would have the bizarre effect of alerting new employees to their employers' antipathy to union organization.

The court of appeals therefore upheld the Board's finding that the turnover of employees in the bargaining unit "was not sufficient to dissipate management's entrenched and pervasive misconduct." Pet. App. A7.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Thus, no further review is warranted.

1. In *NLRB* v. *Gissel Packing Co.*, *supra*, this Court held that the Board has authority to order an employer to bargain with a union even though the union did not win a Board-sponsored election. The Board may issue such an order in a case where the employer's unfair labor practices "have the tendency to undermine majority strength and impede the election process." 395 U.S. at 614. The Court ruled that the Board may order an employer to bargain with an unelected union whenever it finds "that the possibility of erasing the effects of past practices and of ensuring a fair election * * * is slight and that employee sentiment once expressed through [union-authorization] cards would, on balance, be better protected by a bargaining order." *Id.* at 614-615.

Petitioner does not dispute the Board's finding that petitioner's misconduct was so serious and pervasive as to warrant a bargaining order under the *Gissel* standard. Rather, petitioner contends that the Board failed to assess the ef-

fect of employee turnover on the current propriety of imposing such a bargaining order. That contention is without merit.

The Board plainly did not fail to analyze the effect of employee turnover. Rather, as the court of appeals observed, the Board showed "due concern for the employees' Section 7 rights by considering the impact of turnover, and determining that it was not sufficient to dissipate management's entrenched and pervasive misconduct." Pet. App. A7. The Board simply disagreed with petitioner's basic claim that employee turnover had eliminated the need for a bargaining order. The Board found petitioner's claim to be unpersuasive because its unfair labor practices were: (1) pervasive and serious, (2) "committed by the highest management officials," and (3) "directed at virtually every employee in the bargaining unit." *Id.* at. A9-A10 n.2. Thus, it was "foreseeable that [petitioner's] record of coercion would become known to new employees and the impact of [petitioner's] violations would be likely to persist despite any turnover." *Id.* at A10 n.2. Moreover, as the Board and court of appeals noted, petitioner's owners could be expected to "resume their misconduct" if a second election were scheduled. *Id.* at A8, A41-42. In short, the Board and the court of appeals considered the question of turnover in the bargaining unit. They simply and correctly disagreed with petitioner's contention that turnover required a new election.

2. Contrary to petitioner's assertion (Pet. 7-8), there is no conflict between this case and the decisions of the Second Circuit. As petitioner notes, the Second Circuit has consistently required the Board to consider employee turnover before it issues a *Gissel* bargaining order. See, *e.g.*, *NLRB* v. *J. Coty Messenger Service, Inc.*, 763 F.2d 92 (2d Cir. 1985); *NLRB* v. *Pace Oldsmobile, Inc.*, 739 F.2d 108 (2d Cir. 1984); *NLRB* v. *Knogo Corp.*, 727 F.2d 55 (2d Cir. 1984). Here, the Board did consider the effect of turnover

on the need for a bargaining order. And, for the reasons stated above, the Board reasonably found that turnover had not, and would not, dissipate the effects of petitioner's unfair labor practices. Accordingly, the Board satisfied the Second Circuit's requirement before it issued the bargaining order.[1]

Nor was the Board required to delay its remedial order by granting petitioner's request to reopen the record to hear new evidence on the matter of turnover. The Board assumed that there had been significant turnover, and petitioner has pointed to no other new evidence that would have been relevant to the Board's inquiry under *Gissel*. Thus, there was no reason for the Board to reopen the record to receive new and irrelevant evidence. See *NLRB* v. *L.B. Foster Co.*, 418 F.2d 1, 4-5 (9th Cir. 1969), cert. denied, 397 U.S. 990 (1970).[2]

---

[1] The decision below also does not conflict with the other decisions that petitioner cites. In *NLRB* v. *Century Moving & Storage, Inc.*, 683 F.2d 1087, 1094-1095 (7th Cir. 1982), the court refused to enforce a bargaining order because the violations were not "outrageous" or "pervasive," "had little immediate or residual impact," and were mitigated by reinstatement of the illegally laid-off employees. The court said that its decision was "bolster[ed]" by the circumstance that two of five card-signers were no longer in the unit. 683 F.2d at 1094. In *NLRB* v. *Western Drug*, 600 F.2d 1324, 1326 & n.5 (9th Cir. 1979), the court refused to enforce a bargaining order where all three employees in the unit voluntarily resigned before the unfair-labor-practice hearing. The court cautioned that it held "only that the Board must consider events occurring before the administrative hearing." 600 F.2d at 1326 n.5. Neither case is inconsistent with the decision in this case to enforce a bargaining order where the Board found that the illegal practices were severe, widespread, and likely to be repeated.

[2] Petitioner incorrectly contends (Pet. 8) that the Second Circuit requires the Board to reopen a proceeding on the eve of issuing a bargaining order in order to consider evidence of turnover. The Second Circuit (like the D.C. Circuit) requires the Board to consider turnover;

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

FEBRUARY 1990

---

it does not require the Board to reopen the evidentiary record whenever the employer so requests.

* The Solicitor General is disqualified in this case.

U.S. GOVERNMENT PRINTING OFFICE 1990—262 203/00759